

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KHENAN WHITE,

Defendant-Appellant.

UNPUBLISHED
February 13, 2007

No. 264436
Oakland Circuit Court
LC No. 2004-199197-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 6 to 20 years for the cocaine conviction, 1 to 15 years for the marijuana conviction, and 1 to 15 years for the felon in possession conviction. These sentences are consecutive to three concurrent prison terms of five years for each felony-firearm conviction. We affirm.

Defendant argues that insufficient evidence was adduced at trial to allow a jury to determine that a .22 caliber pellet gun found in his truck was a “firearm,” as that term is statutorily defined. Defendant contends that the gun is not a dangerous weapon in its original, intended operation, and therefore cannot qualify as a “firearm.” We review de novo challenges to the sufficiency of the evidence, viewing the evidence presented in a light most favorable to the prosecution. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

MCL 750.222(d) defines a firearm as follows:

“Firearm” means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber.

Two witnesses testified that the gun in issue was a .22 caliber with a rifle barrel that propelled a projectile by means of compressed gas (CO₂). The evidence also established that there were lead pellets inside the gun when the police seized it, and that the gun was capable of firing a .22 caliber projectile “[a]pproximately 400 feet per second.” There was also specific testimony that guns such as this “have been known . . . to cause injury.” This evidence is sufficient to support the conclusion that the gun was a “firearm” capable of propelling a dangerous projectile. Defendant argues that the Legislature did not intend for a gun such as the one in issue to be considered a firearm for the purpose of the firearm statutes under which he was convicted. However, the language of MCL 750.222(d) is clear and unambiguous and thus plainly sets forth the Legislature’s intent. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006) (“The words contained in a statute provide us with the most reliable evidence of the Legislature’s intent.”).

Defendant also argues that defense counsel’s failure to present expert testimony regarding the issue of whether the .22 caliber pellet gun was a firearm under Michigan law constituted ineffective assistance of counsel. This argument fails because the gun clearly falls within the parameters of the statutory definition. “[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.” *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998)

Defendant further argues that the statutory definition of a “firearm” found in MCL 750.222(d) is unconstitutionally vague because it does not require the prosecution to produce evidence of the dangerousness of the projectile capable of being propelled by the weapon. We disagree.

Generally, apart from First Amendment¹ overbreadth concerns, a criminal statute may be challenged for vagueness on grounds that it (1) does not provide fair notice of the conduct proscribed, or (2) is “so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.” *People v Kalchik*, 160 Mich App 40, 45; 407 NW2d 627 (1987). A statute is not unconstitutionally vague if “the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or even the words themselves, if they possess a common and generally accepted meaning.” *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988). A vagueness challenge is examined in light of the particular facts of a case. *People v Lueth*, 253 Mich App 670, 677; 660 NW2d 322 (2002).

We conclude that the statutory definition of “firearm” is not unconstitutionally vague. The plain meaning of the language of MCL 750.222(d) clearly indicates which weapons are included and excluded. As for the term “dangerous,” it is defined, in part, to mean “able or likely to cause physical injury.” *Random House Webster’s College Dictionary* (1997). Evidence adduced below established that there were lead pellets inside the gun when the police seized it. The factory specifications for the gun in issue provided that it was capable of firing a .22 caliber projectile “[a]pproximately 400 feet per second.” There was also specific testimony that guns

¹ US Const, Am I.

such as this “have been known . . . to cause injury.” Thus, defendant fails to overcome the presumption of constitutionality in light of the facts of this case. The statute provides fair notice of the type of behavior proscribed, and does not grant a fact-finder unfettered discretion to find guilt. *Kalchik, supra*.

Defendant also argues that his due process right to a fair trial on the charge of felon in possession of a firearm was violated when the trial court erred in failing to instruct the jury that an element of the offense is defendant’s knowledge (1) of the presence of the firearm in his vehicle and (2) that the gun found in his truck was a firearm under Michigan law. We disagree. We examine the jury instructions as a whole, and reversal is not required when the issues are fairly presented and sufficiently protect the defendant’s rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Although our appellate courts have not specifically stated that knowledge of the presence of the firearm is an element of the crime of felon in possession, our Supreme Court has reasoned that possession of a firearm in general can be either actual or constructive. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). Constructive possession exists if the location of the firearm is known and reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

In this case, the trial court instructed the jury as follows:

On count five [defendant] is charged with having possession of a firearm in this state after having been convicted of a specified felony. To prove this charge and these are the stipulations that came in ladies and gentlemen. The prosecutor must prove beyond a reasonable doubt. One, that [defendant] possessed a firearm in this state; two that [defendant] was convicted of a specified felony stipulated to; and three likewise that less than five years have passed since all fines were paid.

Possession does not necessarily mean ownership, it means either a person has actual physical control of the substance or thing, as this mug that I now have in my hand, or that a person has a right to control the substance or thing even though it may be in a different room or place.

Possession may be singular or solo where one person alone possesses it, or it may be joint where two or more people share in its possession. It is not enough that [defendant] merely know about cocaine, marijuana and/or a gun, it is—one possesses those items only if he or she had control of them or the right to control them either alone or with someone else.

* * *

A person has possession of a firearm when it’s available and accessible at the time the felony is committed. Actual possession of a firearm at the time of arrest is not required, and access to the weapon is not to be determined solely by reference to an arrest.

We conclude that these instructions properly informed the jury of the knowledge requirement of the crime of felon in possession.

Next, defendant argues on appeal that his convictions for both felon in possession and felony-firearm violate the double jeopardy clauses of the Federal and State Constitutions. Our Supreme Court has rejected this argument. *People v Calloway*, 469 Mich 448, 449-450; 671 NW2d 773 (2003). Defendant posits that the Legislature would have acted differently if the present felon in possession statute was in existence when the felony-firearm statute was drafted. However, the Legislature is presumed to be aware of existing statutes when it enacts another. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Moreover, the Legislature has had years in which to amend the felony-firearm statute to include felon in possession as one of the enumerated excluded felonies and has not done so. This can only be interpreted as intentional.

Defendant further argues that the evidence presented at trial failed to establish his guilt beyond a reasonable doubt of the crime of felon in possession of a firearm.² We disagree. Defendant stipulated to the fact that he had been convicted of a felony and that the sentence date of that felony was December 21, 2005. Therefore, defendant was ineligible to possess a firearm under Michigan law as of the date of his arrest. Further, as discussed above, the evidence was sufficient to establish that the gun in issue satisfied the statutory definition of “firearm.”

Thus, resolution of this issue centers on whether sufficient evidence was adduced to prove beyond a reasonable doubt that defendant was in possession of the firearm in issue. We hold that it was. The evidence presented established that the firearm was found in defendant’s truck, and that defendant was in the driver’s seat when the officers arrived. The arresting officers could not testify with certainty as to the location within the truck where the firearm was found, leaving an open question as to whether defendant or his passenger was the purveyor of the weapon. However, with these facts, the jury reasonably could have concluded that the firearm was accessible to defendant and that if he did not have exclusive possession of it, he jointly possessed it with his passenger.

Finally, we reject defendant’s argument that he is entitled to a new trial due to the cumulative effect of the errors at his first trial. Because we find no error with regard to the above issues, a cumulative effect of errors is incapable of being found. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

² In his question presented to this Court, defendant states that there was insufficient evidence on each of the offenses with which he was charged. However, defendant merely asserts in his supporting argument that there was not legally sufficient evidence to convict him of being a felon in possession of a firearm. Defendant’s failure to properly brief the merits of his challenge except with respect to felon in possession means that all other sufficiency challenges referenced in the question presented have been abandoned.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto